INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulation involved	2
Statement	3
Argument	4
Conclusion	10

CITATIONS

Cases:

Hagner v. *United States*, 285 U. S. 427 10

Perniciaro v. *United States*, No. 1085, O. T. 1946, certiorari denied April 14, 1947 10

Stassi v. *United States*, 152 F. 2d 581, certiorari denied, 328 U. S. 842 10

Statute and regulation:

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 894 (50 U. S. C. App. 311) 2

Selective Service Regulation 626.1 (6 F. R. 6843) 3, 8

750320—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 169

LESLIE MURRAY WAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 124–133) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 11, 1947 (R. 133). The petition for a writ of certiorari was filed July 2, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's conviction of knowingly failing to notify his draft board of a material change in his employment status was erroneous because the trial judge, sitting without a jury, made certain statements during the course of the trial and before his finding and determination of guilt, which might indicate that at the moment he (a) believed that the intent with which petitioner so failed to notify his board was immaterial, and (b) entertained a reasonable doubt of petitioner's guilt.

2. Whether the trial judge properly considered as irrelevant the question of whether petitioner might or might not have been drafted if he reported his changed employment status as required.

3. Whether the indictment sufficiently apprised petitioner of the nature of the charge made against him.

STATUTE AND REGULATION INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 894 (50 U. S. C. App. 311), provides in pertinent part:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the dis-

> trict court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

Selective Service Regulation 626.1 (6 F. R. 6843) provided in pertinent part:

> 626.1. *Classification not Permanent.*—(a) No classification is permanent. * * *
>
> (b) Each classified registrant shall, within 10 days after it occurs, * * * report to the local board in writing any fact that might result in such registrant being placed in a different classification. * * *

STATEMENT

Count 2 of a two-count indictment filed July 26, 1945 (see R. 2) in the District Court for the Eastern District of New York charged petitioner and others with having knowingly refrained from disclosing to petitioner's local draft board facts in respect of his liability for selective service, to wit, that from September 3, 1944, to December 18, 1944, he was not employed by the Universal Camera Corporation and that his employment by that company had terminated on or about September 3, 1944, in violation of Section 11 of the Selective Training and Service Act of 1940 and Selective Service Regulation 626.1 (b), *supra* (R. 7–8).[1]

[1] Count 1, charging conspiracy, was dismissed prior to the trial on motion of the Government (R. 10). Severances as

Following a trial by a judge, a jury having been waived (R. 9), petitioner was found guilty (R. 108)[2] and sentenced to imprisonment for six months (R. 114). On appeal, the judgment of conviction was affirmed (R. 133).

The evidence adduced at the trial is summarized in the opinion of the circuit court of appeals (R. 126–129), and need not be restated.

ARGUMENT

1. Petitioner contends (Pet. 3, 22–24) that his conviction was erroneous because the trial judge, who sat without a jury, expressed the view, in a colloquy with counsel during the trial, that petitioner's intent in failing to report to his draft board that he had ceased working for the Universal Camera Corporation on September 2, 1944, was immaterial (see R. 68, 70). This occurred on April 30, 1946, on which date the judge, having previously found petitioner guilty, reopened the case for the purpose of hearing further evidence (see fn. 2). Petitioner also contends (Pet. 3–6, 24–25) that it was error for the judge to convict him because the judge entertained a reasonable doubt that petitioner's failure

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to petitioner's codefendants under count 2 were also granted on motion of the Government (*ibid.*).

[2] Petitioner was first found guilty on March 29, 1946 (R. 9, 58). On motion of counsel for petitioner, the case was reopened on April 30, 1946, for the purpose of hearing additional evidence (R. 59), and on May 24, 1946, petitioner was again found guilty (R. 108).

to notify the board of his change in occupational status was deliberate. This contention is based on the following comments of the judge:

> * * * I was a little bit sure it was rather deliberate at one time. I am not too sure that it was deliberate now. I think he knew he should have reported, and he did not, and it may be he thought he would get back to work any day. * * * (R. 107).

This was said by the judge on May 20, 1946, in the course of oral argument on a motion to dismiss the indictment. As pointed out by the circuit court of appeals (R. 132), however, both the statements of the judge on April 30 and the quoted comments of May 20 were "*ad interim* utterances" and did not affect the finality of the judge's general finding. In his oral decision in which he found petitioner guilty, which occurred on May 24, 1946, the judge said:

> I find the defendant guilty, and in view of what has been said through the trial I think I should clear something up. It is my opinion that this defendant did not comply with the statute which required him, after ten days, to notify the draft board of the change in status in his employment, and that he did not notify the Draft Board until some two and one-half months later of this change. He says he did not think he had to report that to the Draft Board. I believe that an intention

> not to comply with the statutory provisions can be spelled out of his failure to comply with the statute, especially in view of the time which elapsed between the ten-day period, which was the time in which he was compelled to notify the Draft Board and the time he actually did notify the board. (R. 108.)

Clearly, there was no suggestion here that the judge thought intent immaterial or that he had any reasonable doubt of petitioner's guilt.

Petitioner, however, urges that the judge, in the quoted language, adopted an "arbitrary and fallacious presumption * * * that non-compliance with the regulation spells out criminal intent and that hence such intent cannot be an issue" (Pet. 5; see also Pet. 25–28). We submit that this conclusion is not warranted by the language. The words, "especially in view of the time which elapsed between the ten-day period, which was the time in which he was compelled to notify the Draft Board and the time he actually did notify the board," demonstrate that the judge was not presuming, from the mere failure to report, an intention to violate the regulation, but rather that he found such intention from, among other things, the long time petitioner permitted to elapse without notifying the board of his change of status. A reading of the entire record, moreover, shows that the judge was constantly endeavoring to discover what petitioner's

"state of mind" was (R. 33, 37, 46, 47, 50, 82, 83, 85), whether his failure to notify the board was "wilful" (R. 25, 28), whether he acted "intentionally * * * or not" (R. 39), why he "let this thing slide" for 3½ months (R. 40, 69, 70, 82), whether he had "any forgivable or excusable reason" for not notifying the board (R. 99), etc. In view of these repeated statements of the judge throughout the trial, we think there is no justification for imputing to him, on the basis of the record as a whole, a belief that the intent with which petitioner refrained from reporting to the board his change in occupational status was immaterial.

2. Petitioner also contends (Pet. 7–10, 29–32) that it was error for the trial judge to consider as irrelevant (see R. 27, 39, 84, 86) the fact that, even if petitioner had reported to his board his cessation of work at the Universal Camera Corporation, he probably would not have been drafted because of the Army's expressed desire for men under 30 years of age at the time.[3] It is true, as the circuit court of appeals pointed out (R. 129–130), that the New York City Selective Service Headquarters had sent to the local boards Army bulletins of a confidential nature stating that in the New York locality the Army was not then in immediate need of men over 30 years of age, and that the Army preferred younger men

[3] Petitioner was 31 years old when he stopped working at Universal on September 2, 1944 (see R. 28).

for military service. The local boards were accordingly informed that men over 30 might be granted an occupational deferment if they were "filling a useful job in an activity reasonably necessary for the legitimate needs of the community." Regulation 626.1 (b), which petitioner allegedly violated, however, required each registrant to report to his local board in writing within 10 days any fact that might result in his being placed in a *different classification* (*supra,* p. 3). Even assuming, therefore, that petitioner may not have been drafted if he notified his board that he was no longer working for Universal, it was virtually certain (and indeed was admitted by petitioner's counsel (R. 27)) that he would have lost his II–B classification ("Necessary man in war production" (see R. 126, fn. 2)). Clearly, therefore, as observed by the court below (R. 130), "the bulletins were not intended to relieve men who had registered and obtained a classification deferring them—because engaged in war work—from notifying the local boards of facts which might result in their being placed in a different classification and in having their deferment terminated or prolonged on the ground that they were engaged in an occupation which, though not strictly for defense, was 'an activity reasonably necessary for the legitimate needs of the community.' If terminated he might be classified in I–A and if prolonged in II–A."

3. Petitioner further contends that he was convicted of a crime not charged in the indictment (Pet. 10, 32–34). He points out that whereas the selective service regulation involved (*supra,* p. 3) required each registrant to report to his local board, within 10 days after it occurred, any fact that might result in his being placed in a different classification, the indictment charged him with failing to disclose facts in respect of his liability for service. The indictment, however, was specific as to the facts alleged to have been concealed, viz., petitioner's termination of employment with Universal on or about September 3, 1944, and his non-employment by that company from that time to December 18, 1944 (*supra,* p. 3). Petitioner was thus plainly put on notice of the charge he would have to meet, and the characterization of the facts allegedly not reported as "facts as to * * * liability * * * for service" (R. 8), rather than facts which "might result in [his] being placed in a different classification" (*supra,* p. 3), was manifestly not prejudicial. The proper test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense,

whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Hagner* v. *United States,* 285 U. S. 427, 431. Furthermore, while petitioner moved to dismiss the indictment prior to verdict (R. 100–109), the motion was based on an entirely different ground from that embodied in the present contention, which was made for the first time on appeal.[4]

CONCLUSION

The petition for a writ of certiorari presents no question, in our opinion, requiring further review by this Court. We therefore respectfully submit that it should be denied.

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AUGUST 1947.

[4] Petitioner also contends that the terms of Selective Service Regulation 626.1 (b) are too vague and indefinite to support a criminal prosecution and conviction for knowingly failing to comply with it (Pet. 11, 35–37). The contention is without merit. *Stassi* v. *United States*, 152 F. 2d 581, 582 (C. C. A. 5), certiorari denied, 328 U. S. 842; see also our briefs in opposition to certiorari in the *Stassi* case (No. 971, O. T. 1945, pp. 7–10), and in *Perniciaro* v. *United States.* No. 1085, O. T. 1946, pp. 8–9, certiorari denied April 14, 1947.

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